Supreme Court, U.S.
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No. 99-1462

IN THE

Supreme Court of the United States

THE CITY OF FORT WORTH TEXAS,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF CONTINENTAL EXPRESS, INC.

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CORPORATE DISCLOSURE STATEMENT

Continental Express, Inc. is wholly owned by its parent, Continental Airlines, Inc., which is a publicly held corporation.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	1
REASONS TO DENY THE WRIT	3
A. There Is No "Urgent Need" For This Court To Define An Airport Proprietor's Rights	4
B. The Decision Below Presents No Conflict With *Wolens*	9
C. DOT Properly Issued Its Decision Notwithstanding The State Trial Court's Judgment	12
CONCLUSION	15

TABLE OF AUTHORITIES

CASES — Page

American Airlines Inc. v. Wolens, 513 U.S. 219 (1995) 9, 10, 11
Arapahoe County Public Airport Authority v. Centennial Express Airline, Inc., 956 P.2d 587 (Colo. 1998) 7, 8
British Airways Bd. v. Port Authority of New York, 558 F.2d 75 (2d Cir. 1977) 5
Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686 (5th Cir. 1999) 10
City of Houston v. FAA, 679 F.2d 1184 (5th Cir. 1982) 5, 6, 7
Continental Airlines v. Dept. of Transportation, 843 F.2d 1444 (D.C. Cir. 1988) 13
Hines v. Davidowitz, 312 U.S. 52 (1941) 12
Legend Airlines v. City of Fort Worth, No. 2-99-098-CV, Court of Appeals, Second District of Texas, Fort Worth, May 25, 2000 (lodged with the Court) 7, 8
National Helicopter Corp. of America v. City of New York, 137 F.3d 81 (2d Cir. 1988) 5
Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981) 5
Smith v. Comair, Inc., 134 F.3d 254 (4th Cir. 1998) 11
Western Air Lines v. Port Authority, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) 5, 6, 7

STATUTES

28 U.S.C. § 1738 13
49 U.S.C. § 41713(b)(1) 4, 5
49 U.S.C. § 41713(b)(3) 5

TABLE OF AUTHORITIES

Page

MISCELLANEOUS

Centennial Express Airlines v. Arapahoe County Public Airport Authority, FAA Order No.1999-1 (Feb. 18, 1999) 8

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Continental Express, Inc. participated in the underlying Department of Transportation ("DOT") proceeding and was a party to the proceeding in the United States Court of Appeals for the Fifth Circuit to review the DOT decision.

COUNTERSTATEMENT OF THE CASE

The long and unusual history of disputes about airline use of Love Field airport, the federal laws governing that use, various "agreements" relating to that use, as well as the procedural history of the administrative action leading to the decision of the Department of Transportation ("DOT") are well-described in the opinion of the Court of Appeals,

Pet. App. 2-9, and DOT's orders. Pet. App. 53-81, 147-51. We do not rehearse that history in this opposition brief.

However, it is appropriate to highlight that the procedural portrayal of this case in Fort Worth's Petition is disturbing in at least one significant respect. In an effort to cast the federal agency as overreaching, Petitioner asserts thematically that the Department of Transportation decided "to commence an administrative proceeding for the sole purpose of contradicting and undermining a final judgment previously entered by a state court involving the same principal parties and issues." Pet. 5.

Petitioner's assertion is inaccurate both as a description of the federal agency's motivation and as a description of the sequence of events. The agency proceeding was initiated *before* the state court's summary judgment decision was issued. Moreover, that proceeding was begun at the request of several parties, including Fort Worth itself. DOT acted quite properly to resolve the federal law questions within its area of special expertise by commencing a proceeding *and*, after initiating that proceeding, issuing its decision notwithstanding a ruling by the state court involving only some of the parties that had an interest in the agency's decision. There is no basis for Petitioner Fort Worth's suggestion that the "sole purpose" – or any purpose – for commencing the administrative proceeding was to undermine the state court's authority. In any event, the state appellate court has now reversed the trial court's summary judgment and agreed with DOT and Fifth Circuit interpretations of the relevant statutes.

Of course, even if Petitioner's recitation about the agency's motives and the sequence of events were true, this would hardly warrant a grant of the petition. Issues concerning airline use of Love Field are matters of clear federal concern and within the special expertise of the Department of Transportation. The Department of Transportation possessed

the power to issue an order, in the public interest, that would be binding as to *all* parties and potential parties concerned. As the court below held, the agency cannot be faulted for properly exercising that power.

REASONS TO DENY THE WRIT

Fort Worth does *not* in its petition challenge the basic authority of the Department of Transportation to resolve issues of airline use of airports such as Love Field, including issues of preemption of local authority in general and the "proprietary power" exception in particular. Instead, accepting DOT's general authority over the basic subject matter of the dispute, Petitioner presents three questions. The first two questions address whether DOT wrongly decided the "proprietary power" and "preemption" issues. The third question challenges the agency's authority to render a decision after the state trial court announced its judgment.

None of the issues warrants this Court's review or is well-presented for review by the instant petition. The longstanding and rather unique dispute involving airline use of Love Field, the novel compromises associated with resolving those disputes as well as Congress' direct involvement in the process of resolving issues relating to this particular airport (through the Wright and the Shelby Amendments) all greatly influenced the analysis of the court below. That unique history and the two specific statutes addressing the use of Love Field could well be instrumental in determining the appropriate disposition of this particular case. But the existence of those unique factors in this case would likely stand as an obstacle to using this case as a vehicle for resolving or clarifying, for example, the application of the "proprietary power exception" generally – even assuming that the Court believed this to be a matter on which the lower courts required the Court's guidance at this time. Moreover, the procedural posture of the case, arising as it does through

Fort Worth's efforts to force *Dallas* to take certain action with respect to Love Field and Fort Worth's use of a state law *contract* theory to effect that change, further complicates this case and undermines Fort Worth's effort to characterize this case as a proper vehicle for this Court to define the scope of the "proprietary powers" exception or any other issue related to preemption, the use of the nation's airports, or issues of agency claim preclusion.

A. There Is No "Urgent Need" For This Court To Define An Airport Proprietor's Rights

Notwithstanding Petitioner's suggestion that there is an "urgent need" for the Court to "define an airport proprietor's rights," the lower courts do not seem to have experienced much difficulty in "defining" such rights on an incremental case-by-case basis. Thus, with due deference for the Department of Transportation's expertise in this field, there appears to be fair consistency in the cases addressing "proprietary rights" issues. Petitioner's effort to portray the agency decision and the decision of the court below as aberrational or out of step with the case law is unsuccessful.

In deregulating the airline industry in 1978 with passage of the Airline Deregulation Act ("ADA"), Congress plainly did *not* wish to substitute a patchwork of state or local regulation of prices, routes or service for the scheme of federal aviation regulation. Section 41713(b)(1) of the Airline Deregulation Act provides that

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a *price, route, or service* of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1) (emphasis added). There is no question that Fort Worth was here attempting to limit airline operations in a manner "relating to . . . routes" and "service."

At the same time as it sought to preempt state and local regulations, Congress preserved the right of a "State, political subdivision of a State, or a political authority of at least 2 States that owns or operates an airport . . . from carrying out its proprietary powers and rights." 49 U.S.C. § 41713(b)(3). Thus, the rights of a state political subdivision, acting as airport proprietor, are preserved. But given the fact that state political subdivisions own or operate most airports, an expansive interpretation of proprietary rights to encompass direct regulation of "prices, routes and service" would undermine the basic preemptive purpose of the ADA and balkanize airline route and price regulation.

Ordinarily, it has not been difficult for the courts to distinguish between preempted "price, route and service" regulation, on the one hand, and "proprietary power," on the other. Many of the controversies have involved state or local efforts to limit noise or address environmental concerns.[1]

Petitioner asserts that the restrictions that it seeks to implement and enforce at Love Field are like the perimeter restrictions held to be lawful exercises of local proprietary power in *Western Air Lines v. Port Authority,* 817 F.2d 222 (2d Cir. 1987), *cert. denied,* 485 U.S. 1006 (1988), and *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). The perimeter restrictions at issue in those cases, of course, were very different than what Fort Worth proposes for Love Field. In those cases, the restrictions limited the distance that might

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[1] *National Helicopter Corp. of America v. City of New York*, 137 F.3d 81, 88-89 (2d Cir. 1988); *British Airways Bd. v. Port Authority of New York*, 558 F.2d 75, 84 (2d Cir. 1977); *Santa Monica Airport Ass'n v. City of Santa Monica,* 659 F.2d 100, 104 (9th Cir. 1981).

be flown on nonstop flights to and from the airport – a "perimeter rule." Passengers were free to connect at the intermediate stop for travel to and from whatever points they chose, and the airline was free to operate flights between the restricted airport and other airports without limit so long as a stop was made within the relevant perimeter. The airline also had the ability to offer through fares and through baggage service. Fort Worth, in contrast, would limit the destinations to four contiguous states rather than to any destination within a set mileage range, prohibit flights to or from points beyond the four contiguous states, and prohibit through fares and through baggage service.

The type of restriction that Fort Worth insists upon enforcing now is, therefore, not a "perimeter" restriction, but rather a novel form of route regulation unique to Love Field. Its uniqueness stems not from some specialized local interest but rather from the fact that the genesis of the restriction is an idiosyncratic political compromise (reflected in the Wright Amendment) rather than a pure effort at airport or municipal management geared precisely to local interests.

Moreover, in both *Western Air Lines* and *City of Houston*, the airport owner had demonstrated a specific need for the restriction at issue to serve a local objective independent of its desire to limit airport use. In the instant case, a decisive factor was Petitioner Fort Worth's failure to articulate a local objective other than its desire to bolster service at another airport. The absence of evidence of any local interest independently served by the proposed restriction was fatal to Petitioner's argument in this case. Pet. App. 34-36; Pet. App. 107-108. Thus, the decision below reflects *no* disagreement with the decision of any other circuit on any point of law. Rather, the distinction between the result in this case and the results in *Western Air Lines* and *City of Houston* are based on the facts. In any event, this Court could not fairly elaborate on the nature of the local interests that are properly the

subject of the proprietary rights exception in this case, where no local interest has been suggested short of a desire to regulate routes in order to allocate flights to one airport rather than another.

The Texas state appellate court itself has now concluded that the Airline Deregulation Act preempts the bond ordinance restrictions, that enforcement of the restrictions is not a permissible exercise of proprietary powers under the Airline Deregulation Act and that the interpretation of the commuter airline exception rendered by DOT and the Fifth Circuit is correct. *Legend Airlines v. City of Fort Worth*, No. 2-99-098-CV, Court of Appeals, Second District of Texas, Fort Worth, May 25, 2000 at 30-31 (lodged with the Court).

Petitioner relies heavily on *Arapahoe County Public Airport Authority v. Centennial Express Airline, Inc.*, 956 P.2d 587 (Colo. 1998), which it says is in conflict with this case. But that case simply involved the question whether an airport proprietor could *maintain* an airport precisely as it had historically operated, without *any* scheduled passenger service.

The question whether a municipal proprietor can choose to maintain a small airport without any regularly-scheduled passenger service is plausibly viewed as a core matter of local government interest. One can easily characterize the decision whether to accommodate passenger service at an airport that has historically not had such service as a major issue of local concern, for there can be large scale implications to that decision. Thus, the Colorado courts viewed the decision whether to allow an airport to be converted to commercial passenger service uses at all as near the core of a municipality's prerogatives.

Moreover, in terms of the ADA's preemptive force, the issue whether to create a passenger airport at all would appear to be far less a matter of *route* regulation than the unique

route restriction championed by Fort Worth here. The Colorado Supreme Court in *Arapahoe* concluded that the regulation in question there was *not* a regulation of airline prices or routes "because the ban on scheduled service does not delineate what airlines can charge or where they can fly." 956 P.2d 587, 595 (Colo. 1998).

We note that the DOT's Federal Aviation Administration has concluded that the restriction at issue in *Arapahoe* is impermissible, reaching a conclusion contrary to that of the Colorado courts. *Centennial Express Airlines v. Arapahoe County Public Airport Authority*, FAA Order No. 1999-1 (Feb. 18, 1999). That decision is currently under review by the Tenth Circuit. (*Arapahoe County Pub. Airport Authority v. FAA*, No. 99-9508) (10th Cir. filed March 10, 1999). Similarly, the Texas appellate court reviewing the Love Field litigation in Texas has concluded that "*Arapahoe* is factually distinguishable, and, to the arguable extent that it is not, we agree with the Fifth Circuit that it was wrongly decided and thus decline to follow it." *See Legend Airlines v. City of Fort Worth* at 23, n. 52.

If there arises a conflict between the federal courts and agencies, on the one hand, and the state courts, on the other, concerning Arapahoe County's regulation, we assume that the parties will seek certiorari. But there is no conflict between *Arapahoe County* and *this* case, for the nature of the regulation at issue in the two cases is starkly different.

Finally, in judging the nature of the federal interest at issue in this case, and thus the scope of the proprietary power reserved to the airport owner, both the Wright and Shelby Amendments must be given effect. Those enactments demonstrate a specific federal interest and legislative determination about the appropriate use of a specific airport that is already in operation as part of the national infrastructure of commercial airports operating in interstate

commerce. Fort Worth's approach seeks to vitiate the federal plan reflected in the Wright and Shelby Amendments and replace it with a local assertion of authority over the routes to be served at Love Field. The unique legislative background associated with the use of Love Field renders it a difficult case from which useful general guidance on the "proprietary powers" exception might emerge.

B. The Decision Below Presents No Conflict With *Wolens*

Petitioner suggests a conflict between the decision below and this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). *Wolens* indeed holds that the Airline Deregulation Act leaves states free to enforce an "airline's alleged breach of its own, self-imposed [contractual] undertakings." *See* Pet. App. 20. As the basis for the application of that principle in this case, Petitioner cites the "Use Agreements that some, but not all, airlines serving DFW Airport have executed." Pet. App. 19. Petitioner asserts that those airlines that executed such agreements "have agreed to use DFW Airport for all their interstate flights in North Texas."[2]

Wolens, of course, states that "the ADA permits state-law-based court adjudication of routine breach-of-contract claims." 513 U.S. at 232. At issue in *Wolens*, however, were simply the contracts between airlines and passengers, involving the "terms and conditions airlines offer and passengers accept." *Id.* at 228. Those independent "self-imposed undertakings" were contrasted with "state-imposed obligations." *Id.* Whereas state-imposed obligations were easily regarded as regulatory in character, and thus preempted, the wholly private contracts between passenger

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[2] *Id.* Continental Express has not entered into such an agreement.

and airline were seen as "self-imposed undertakings," non-regulatory, and thus not preempted.

The breach claim at issue here hardly qualifies as a "routine breach-of-contract claim." Neither can the "Use Agreements" at issue be likened to the wholly private party agreements at issue in *Wolens*. To the contrary, the "Use Agreements" relied upon by Petitioner were between the DFW Airport Board itself and certain airlines. Among the many mechanisms available to a municipality or state subdivision to implement its regulatory objectives are contracts. The fact that the state subdivision can implement its will most effectively in some instances by acting through a contract does not change the fundamentally regulatory nature of its action.[3] Here the "agreements" were the product of a political process, paralleling an ordinance issued for the same purpose, encouraging greater use of Dallas/Fort Worth International Airport at the expense of Love Field.[4] Thus, these are *not* the type of private, contractual obligations, voluntarily undertaken by an airline, held in *Wolens* to be unpreempted, and thus enforceable under ordinary state contract law.

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[3] Not *every* municipal contract is necessarily the equivalent of a regulation, *see* Pet. App. 44, and the courts have distinguished between regulatory contracts implementing policies and contracts for services. For instance, the Fifth Circuit in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999) recently construed a preemption provision identical in relevant respects to that in the ADA and held that a city's contract with a towing service was not preempted, as the city was attempting simply to procure a needed service and was not seeking to implement a regulatory policy. *See id.* at 693-95.

[4] In *Wolens* the Court adopted the principle that "States may not seek to impose their own . . . theories of competition . . . on the operations of an air carrier," *see* 513 U.S. at 229 n.5, yet that is precisely what Fort Worth seeks to accomplish by contract.

The distinction between self-imposed and state-imposed obligations "confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." 513 U.S. at 233. *See also Smith v. Comair, Inc.*, 134 F.3d 254, 257 (4th Cir. 1998). The "Use Agreements" provide that the signatory carriers conduct their services "to the extent required by the terms" of the bond ordinance entered into by the cities of Dallas and Fort Worth. Pet. App. 45. The bond ordinance, in turn, does not prohibit Love Field service, but rather provides only that the cities "take such steps as may be . . . legally permissible" to phase-out service at Love Field, Pet. App. 2-3. Interpretation of the "Use Agreements" therefore requires resort to the bond ordinance, a local law, and necessarily involves consideration of federal law limiting state and local regulation of aviation. Since the bond ordinance provides that the cities "take such steps as may be . . . legally permissible" to phase-out service at Love Field, state laws and policies external to the parties' bargain, under Fort Worth's theory, "enlarge or enhance" the parties' bargain.

The ADA's prohibition on a municipality's enforcement of any "provision having the force and effect of law" is assuredly broad enough to encompass enforcement of contracts *with* a State's political subdivision or any municipality. Even if it was not expressly preempted, the enforcement of such contracts would assuredly frustrate implementation of the federal scheme. *See Hines v. Davidowitz*, 312 U.S. 52 (1941) (preemption of state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

In Fort Worth's view, notwithstanding that a municipality would clearly *not* be permitted to bar an air carrier operating at DFW from providing service, for example, to California, that same municipality could insist that in exchange for

various services provided by the airport, that air carrier must "agree" not to provide service to California. Fort Worth's theory is untenable as a matter of law and logic, as DOT, the Fifth Circuit and the Texas appellate court have concluded.

C. DOT Properly Issued Its Decision Notwithstanding The State Trial Court's Judgment

Petitioner apparently relies for much of the emotional force of its argument on what it portrays as the federal agency's failure to defer to a pending state court proceeding. Thus, in its third "question presented," Petitioner chides the Department of Transportation for "having failed to participate in a pending state court lawsuit," and instead initiating a proceeding and issuing a decision after the state trial court had ruled.

Yet there is no question that a federal agency has no obligation to participate as an *amicus* in any state court proceeding. Petitioner neglects to mention that it successfully *opposed* both a motion by the City of Dallas to join the Department as a party to the state court proceeding and the introduction into evidence during the state court proceedings of a June 30, 1998 letter from Nancy McFadden, the Department's General Counsel, stating the Department's position on several issues in the Love Field matter.

Moreover, a federal agency cannot plausibly be faulted for electing to initiate a proceeding and giving the matter formal consideration before rendering a comprehensive decision. *See Continental Airlines v. Dept. of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988) (affirming the Department's 1985 order issued to resolve previous disputes concerning interpretation of the Wright Amendment). Having actually initiated a proceeding and issued a formal decision, the federal agency could not very well submit its decision to the state court as if the state court were the proper court to review that decision.

Fort Worth does *not* dispute in its petition that this matter fell squarely within DOT's expertise and authority. Thus, it was entirely proper, in the first instance, for DOT to resolve the issue presented on the merits. Indeed, its views, as a federal agency charged with enforcement authority in this area of interstate commerce regulation, are to be given primacy in this field. To be sure, Petitioner deployed a state law contract theory in the state court. But given the federal agency's direct authority over airline use of Love Field, it is difficult to identify any basis in "federalism" upon which the federal agency should have deferred to the state court's jurisdiction to resolve the central issue of federal law at the core of the agency's mission. Indeed, Petitioner does not really suggest otherwise.

Instead, Petitioner suggests that federalism requires that a federal agency's duty to defer is triggered by the state trial court's issuance of a judgment.

For the reasons explained by the court below, neither 28 U.S.C. § 1738 nor any common law doctrine would support granting preclusive effect to the decision of the state trial court in these circumstances. Pet. App. 17-22. Even if there are circumstances under which a federal *agency* might give preclusive effect to a state court judgment on an issue of law within the special expertise and authority of the federal agency, those circumstances did not arise here. *Only* the federal agency could issue a ruling that would bind all potentially affected persons. Moreover, as a practical matter, it would have been untenable to afford preclusive effect to the judgment as between the parties to the state court action, leaving the remaining parties subject to an inconsistent *federal* determination.

In this case, it would have been exceptionally difficult for the agency to defer to the state court decision, if perhaps not to the judgment. The state court simply entered a judgment which embodies a conclusion. Pet. App. 178-181. It

describes no analysis to which DOT might have deferred or which might have informed DOT's own judgment. The state court simply did not discuss the issues in any useful detail.

In the first Texas decision analyzing the issues raised, the Texas state appellate court reversed the trial court and concluded that enforcement of the restrictions proposed by Fort Worth are preempted by the Airline Deregulation Act. Although the state appellate court concluded that the trial judge was not required to defer to DOT, it also concluded that DOT's decisions were entitled to "controlling weight." *See Legend Airlines v. City of Fort Worth* at 25, 29. Thus, the apparent conflict between state and federal decisions has now been resolved by the state appellate court's decision.

CONCLUSION

The petition for issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

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